



MARITIME SAFETY COMMITTEE
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RADIOCOMMUNICATIONS AND SEARCH AND RESCUE

Revision of resolution A.888(21) - Criteria for the provision of mobile-satellite communication systems in the Global Maritime Distress and Safety System (GMDSS)

Note by the Secretariat

SUMMARY

Executive summary: This document advises the Committee of the background to the revision of the resolution A.888(21) and provides further advice on the legal issues involved

Action to be taken: Paragraph 15

Related documents: COMSAR 10/16, MSC 79/23 and MSC 81/25

Introduction

1 The Committee will recall that, at its eighty-first session, it considered proposed amendments to resolution A.888(21) - Criteria for the provision of mobile-satellite communication systems in the Global Maritime Distress and Safety System (GMDSS). After discussion, the Committee recognizing that any revised resolution could not be adopted until the twenty-fifth Assembly in November 2007, agreed to reconsider the revision of resolution A.888(21) at MSC 82, on the basis of further comments and proposals from Member States and legal advice.

Background

2 The Committee, at its seventy-seventh session, when addressing the question of intergovernmental oversight of possible future mobile-satellite service providers to the GMDSS, considered document MSC 77/10/4 (Denmark), which informed the Committee of issues raised at the International Mobile Satellite Organization (IMSO) before inviting it to formally request IMSO to carry out such an oversight with respect to possible future providers of the said services as well as to continue overseeing the activities of Inmarsat Ltd. relevant to the GMDSS.

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3 Taking into account comments made by the overwhelming majority of those who spoke in favour of the Danish proposal, MSC 77 agreed that an intergovernmental oversight, similar to the oversight presently carried out by IMSO in respect of Inmarsat Ltd., would be needed when other providers of GMDSS satellite services would, in future, be accepted and recognized by the Organization. It, therefore, instructed the Secretariat to communicate with IMSO enquiring if that organization could carry out the oversight of future providers of satellite services for the GMDSS and advise MSC 78 accordingly. (MSC 77/26, paragraphs 10.39 to 10.40).

4 In addition, MSC 77, in accordance with operative paragraph 3(c) of resolution A.888(21) on Criteria for the provision of mobile-satellite communication systems in the GMDSS, had authorized the COMSAR Sub-Committee to review the resolution, under its work programme item "Satellite services (Inmarsat and COSPAS-SARSAT)", with a view to keeping it updated to secure the long-term integrity of the GMDSS and had approved MSC/Circ.1077 on Procedure for evaluation and possible recognition of mobile-satellite systems notified for use in the GMDSS.

5 The Secretary-General subsequently wrote to the Director of IMSO with the Committee's enquiry. Following the Director's response, MSC 78 noted that the matter of a possible expansion of IMSO's oversight mandate, including intergovernmental oversight of possible future mobile-satellite service providers for the GMDSS, would be considered at the seventeenth session of the IMSO Assembly to be held at the Inmarsat Headquarters, from 18 to 22 October 2004, in London, and that the outcome thereof would be reported to MSC 79.

6 At its seventy-ninth session, the Committee noted that the IMSO Assembly had agreed by an overwhelming majority that IMSO was willing to carry out the oversight of future providers of mobile satellite communications systems services for the GMDSS.

7 Following discussion, MSC 79 confirmed and reiterated its decision at MSC 77, that IMSO was the appropriate organization to carry out the required oversight of future providers of mobile-satellite communication system services for the GMDSS (MSC 79/23, paragraph 22.34); and it, therefore, instructed the Secretariat to communicate with IMSO formally inviting that organization to carry out such oversight.

8 MSC 79 also noted the information provided by IMSO that in the consideration of these matters by the IMSO Assembly, some delegations had expressed the hope that IMO would make progress in reviewing IMO Assembly resolution A.888(21) on Criteria for the Provision of Mobile-Satellite Communication Systems in the Global Maritime Distress and Safety System (GMDSS), to complement the amendments to the IMSO Convention.

9 COMSAR 8 had started its consideration of the issue based on the document by the United States (COMSAR 8/5/1) and had invited Member States to provide their comments and proposals to COMSAR 9 for further consideration.

10 COMSAR 9 established a Correspondence Group under the co-ordination of IMSO to review resolution A.888(21) with terms of reference, set out in annex 9 to COMSAR 9/19.

11 COMSAR 10 considered the report of the Correspondence Group, including the proposed draft revised resolution A.888(21) and a draft reference Public Service Agreement.

In particular, the Sub-Committee noted that:

“In order to establish the new procedure for the evaluation, recognition and oversight of new satellite providers, it was necessary for the Correspondence Group to consider first what functions would be needed in carrying out such a procedure and how IMO and IMSO should allocate those functions between them. The Correspondence Group sought and received informal advice from a range of sources, which can be summarized as follows:

- .1 so far as is possible, it was essential to isolate IMO from any liability arising from decisions that might be taken by the Organization in relation to the participation by commercial satcom providers in the GMDSS, and in relation to the future LRIT system;
- .2 it was equally important to retain a proper role for the MSC in GMDSS regulation and the approval processes that flowed from it;
- .3 the preferred regime was one that would involve the MSC in a general way at the very beginning of an application to participate in the GMDSS, but made **a clear and clean** break between the organizations immediately after that point in the process. This might result in the following general procedure:
 - (a) IMO to establish the regulatory regime, via the revision of resolution A.888(21), stating that IMSO was to evaluate and approve satcom companies to participate in the GMDSS, undertake the oversight on a continuing basis and keep IMO (MSC) informed;
 - (b) the Company would apply – through its Government – to IMO. The application would be reviewed by the MSC – which would have a general discussion of principles and policy issues only – and would forward the application to IMSO; and
 - (c) IMSO would verify the information provided and evaluate the application (the process would be open and transparent with IMO and the sponsoring Government involved as Observers), decide on the acceptability of the applicant (based on criteria established by IMO in the revised resolution A.888(21)) and, if appropriate, recognize the applicant’s services and conduct ongoing oversight. IMSO would also be responsible for ensuring compliance – including any resulting enforcement procedures; and
- .4 this procedure would offer a clean and defensible break between IMO and IMSO at the point between 6.3(b) and 6.3(c) above, while providing the MSC with an ongoing role at the policy level. This would extend into the future generic regime the current practice in relation to the oversight of Inmarsat.

The Correspondence Group had achieved a very broad agreement in support of this approach, and some Governments had already expressed their official support in IMSO for the proposed division of responsibility between IMO and IMSO. However, two countries had not been able to fully agree this approach within the discussions of the Correspondence Group.”

12 At COMSAR 10, with respect to the proposed draft amendments to resolution A.888(21), the delegation of the Russian Federation, while supporting in general the oversight function to be performed by IMSO, expressed concern that the evaluation and recognition of new systems for the GMDSS had been removed from IMO and placed with IMSO. This effectively excluded IMO from the approval process and placed approval and oversight functions with one entity. It might potentially cause a serious conflict of interest particularly because approval and oversight procedures are to be changed.

The delegation of South Africa expressed concern on the potential conflict between the envisaged evaluation and assessment function *vis-à-vis* the approval function. In their view, the latter should remain with IMO.

The delegation of the United States expressed support for most of the technical provisions of the proposed revision to resolution A.888(21) as they pertained to functions to be performed by satellite systems.

The delegation of the United States agreed with the goal of establishing an orderly and expeditious procedure to incorporate additional mobile-satellite systems into the GMDSS. However, the delegation stated that it believed the resolution A.888(21) modification proposals and associated documentation were not mature and that the proposals should not be sent to MSC 81. The United States delegation reserved its position accordingly.

The observer from IMSO reminded the Sub-Committee of the decisions of MSC 79 which confirmed that IMSO was the appropriate organization to carry out the required oversight of future providers of satellite services for the GMDSS, and also advised the Sub-Committee of the processes being carried out within IMSO in relation to amending the IMSO Convention in respect of possible alternative providers of satellite services.

Given the experience of previous amendments to the IMSO Convention and related processes, which he explained in detail, the observer from IMSO stated that using the rapid implementation process, IMSO could be ready to commence oversight as required some three months after acceptance by the IMSO Assembly, subject to the decisions of the IMSO Members.

After an in-depth discussion at COMSAR 10, during which there was a clear majority who expressed support for the resolution as revised by the Correspondence Group, COMSAR 10 agreed to the proposed amendments to resolution A.888(21), as amended, for submission to MSC 81 for consideration and action, as appropriate.

Discussion at MSC 81

13 MSC 81 considered the proposed amendments to resolution A.888(21) as indicated hereunder.

“15.8 The delegation of the United States was of the opinion that the draft revision of the resolution had failed to establish an orderly and expeditious procedure for the enhancement of the GMDSS through the addition of new satellite service providers. The United States expressed concern at the proposed role of IMSO in approving new satellite systems and also carrying out the oversight function. The United States was concerned that the participation in the GMDSS by new service providers would be discouraged.

In addition, the United States did not agree with the legal interpretation that IMO has a different legal risk than the IMSO and, therefore, did not share the view that it was somehow necessary to isolate IMO from decisions that might be taken in relation to the participation by commercial satellite providers in the GMDSS. The delegation of the United States also noted that amendments to SOLAS in respect of additional satellite providers would be necessary and suggested that the draft resolution should be referred back to the COMSAR Sub-Committee.

15.9 The delegation of South Africa in supporting the views of the United States reiterated its opinion as expressed at COMSAR 10 on the potential conflict in its view between the approval process and oversight by IMSO.

15.10 The delegation of the Russian Federation also reiterated the views expressed by that delegation at the Sub-Committee in relation to the evaluation and recognition of new systems being placed with IMSO, although it supported the role of IMSO in the oversight function.

15.11 The delegations of Germany and Turkey supported the views expressed by the delegation of the United States.

15.12 The observer from IMSO informed the Committee in detail of his view on the fundamental differences between the IMSO Convention and the IMO Convention in respect of liability and contractual arrangements with private companies.

15.13 The delegation of Cyprus, supported by many delegations, considered that there was no point in instructing COMSAR Sub-Committee to review the resolution again, in that the technical aspects had been completed and that the issues under discussion were political and legal, not technical, in nature and therefore should be considered by the Committee. The delegation of Cyprus proposed that the resolution should be reconsidered at MSC 82.

15.14 The Director, Legal Affairs and External Relations Division of the Secretariat noted that she was concerned to uphold the traditional privileges and immunities enjoyed by IMO and to protect the Organization from any possible legal liability and that her comments should be received in this spirit and not as an attempt to curtail the Organization's legitimate activities.

The Director informed the Committee that IMO's immunity from judicial suit stemmed from its status as a specialized agency of the United Nations. In this connection, the IMO Convention was relevant in that it established the mandate of the Organization. Provided the Organization continued to act within the framework of this mandate, namely in its traditional regulatory role in the field of international shipping, it would enjoy the privileges and immunities set out in the Convention on Privileges and Immunities of the Specialized Agencies.

If, however, IMO were to stray outside of its regulatory functions and into the commercial arena, it could run the risk of exposing the Organization to a claim for damages, as its immunity from judicial process is based on the fact that IMO is not a commercial entity but an international organization with a regulatory mandate. Accordingly, the Committee should bear these factors in mind in deciding what precise role the MSC should play in relation to the establishment of mobile satellite communication systems in the GMDSS. In this connection, the Director suggested that, if

the current regulatory framework was regarded as inadequate for these purposes, the Committee might consider a relevant amendment to the SOLAS Convention as one possibility. The Legal Office would be happy to provide the Committee with any additional advice on the subject, at the next session.”

14 The Secretariat and the Legal Affairs and External Relations Division provide the following further advice:

- .1 as suggested in paragraph 15.14 of the MSC 81 report, it is advisable to include a basic provision in the SOLAS Convention in order to clearly indicate that any action to be taken for approval and oversight of satellite providers under GMDSS would fall into the Organization’s traditional regulatory role in the field of international shipping, so that IMO would enjoy immunity from judicial process in respect of such actions because IMO would be assuming regulatory responsibility for the approval and oversight process pursuant to the SOLAS Convention;
- .2 reference may be made to the amendments to SOLAS Chapter V adopted by the Committee at its eighty-first session which included a provision stating that the “Maritime Safety Committee shall determine the criteria, procedures and arrangements for the establishment, review and audit of the provision of long-range identification and tracking information to Contracting Governments pursuant to the provisions of this regulation.” Under this provision, the Committee will be able to take necessary regulatory actions concerning LRIT systems. This could be used as a model for a new provision for oversight and approval of GMDSS satellite providers;
- .3 if a similar provision were to be included in SOLAS Chapter IV, the Committee or another body acting on behalf of the Committee would be protected from judicial process when taking any necessary regulatory action for approval and oversight of GMDSS satellite providers, because such actions would be considered as regulatory activities under the IMO Convention and the SOLAS Convention. In such a case, a “clear and clean break” between IMO and IMSO may not be necessary because regulatory activities for approval and oversight of GMDSS service providers, whether performed jointly or separately, would not be subject to judicial process; and
- .4 if the above approach were to be adopted (i.e., including a new provision on GMDSS oversight modelled on the text adopted for LIRT) then the question of assigning both functions, i.e. “approval and oversight,” to IMSO (or to another body acting on behalf of the Committee, would be a matter of policy and not a legal issue.

Action requested of the Committee

15 The Committee is invited to take account of the above in its consideration of the revision of resolution A.888(21).